BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL E. MULLEN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,047,712
THE FLESH COMPANY	)	
Respondent	)	
AND	)	
	)	
CINCINNATI INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the January 27, 2010 preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein.

ISSUES

The ALJ found that the claimant suffered an injury that arose out of and in the course of his employment with the respondent.[1]

Respondent requests the preliminary hearing Order be reversed. Respondent alleges first that credible medical evidence indicates claimant's complaints are a result of a preexisting congenital fusion and second, that claimant's job duties did not aggravate, exacerbate or accelerate claimant's preexisting condition.

Claimant argues the respondent filed its brief out of time and, therefore, the application for review should be denied. He further argues if the application is not denied the ALJ's Order should be upheld.

---

[1] ALJ Order (Jan. 27, 2010). The ALJ ordered reimbursement of claimant's out-of-pocket expenses from Labette Health Clinic, Dr. Estep, Dr. Majzoub, Dr. Al-Shathir, Dr. Daus, Dr. Lieurance and Dr. Ball. Temporary total disability benefits from December 16, 2009, continuing until claimant is released to work by his shoulder surgeon was also ordered. Finally, claimant's shoulder surgeon, Dr. Ball, was authorized.

The issues are:

- Whether the Board has jurisdiction.
- If so, whether claimant suffered a personal injury by accident arising out of and in the course of his employment with the respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant argues respondent filed its brief out of time. A briefing schedule was issued on February 8, 2010, ordering respondent's brief due on February 18, 2010, and claimant's brief due on March 1, 2010. On February 18, respondent requested an extension to file its brief. The extension was granted, giving respondent until March 1, 2010, to file its brief. Respondent did not file its brief until March 16, 2010. As a result of respondent's tardy brief, claimant requested additional time to file his brief. Claimant was granted additional time and claimant submitted his brief within the time granted, on March 29, 2010. This Board Member received, reviewed and considered respondent's tardy brief. To cure any possible prejudice to the claimant, this Board Member also received, reviewed and considered claimant's brief. This matter is properly before this Board Member and shall not be dismissed.[2]

Claimant has worked for the respondent for more than 20 years. In March or April 2008 claimant started a new position within the company working as a pre-press worker. His job duties in the pre-press area were dumping trash, which could weigh up to approximately 100 pounds, and setting up the presses with ink and chemicals. Claimant testified he started experiencing pain in both shoulders, mainly his left because of spasms and tingling in his left arm, in August or September 2008.[3] On October 22, 2008, claimant told his supervisor about the pain he was experiencing in his shoulders.[4] Before August or September 2008, claimant had experienced no pain or problems with his shoulders.

Claimant was initially seen on October 29, 2008, at Labette Health for the pain he was experiencing at work. Claimant testified that he was diagnosed with bilateral shoulder

[2] K.A.R. 51-18-4.

[3] P.H. Trans. at 9.

[4] *Id.*, at 8, 9.

strain and was provided medication and a 25-pound weight restriction.[5] Claimant received additional treatment and was ultimately referred to Dr. Hish Majzoub, a neurosurgeon.[6] In an addendum in a January 21, 2009 letter to Vince Johnson of Cincinnati Insurance Company, Dr. Majzoub wrote:

> I would say that this patient was born with a congenital fusion of C5-C6 resulting in more stress at the C4-C5 interspace. This happens many times where there is a fusion at one level. It will add more stress on the adjacent levels. Since he had the fusion congenitally it put more stress on at C4-C5 resulting in arthritis at that level. This arthritis caused the stenosis and was apparently aggravated by the trauma. This is the reason for the arthritis at C4-C5 since he has a congenital fusion at C5-C6 resulting in more stress at C4-C5 giving him the arthritis that was aggravated by the trauma resulting in the symptoms in the left arm only.[7]

In a letter to respondent's attorney, Dr. Majzoub wrote:

> I think that your letter summarized my viewpoint very well. The injury aggravated a preexistent congenital disease and did not cause his disease. As I stated before the fusion at C5-C6 put more stress at the level above which is C4-C5 and caused arthritis and spur formation giving him symptoms. In view of that I feel that his symptoms were an aggravation and that his condition was not work related.[8]

Subsequent to an examination and evaluation by Dr. Majzoub, claimant had cervical spine surgery by Dr. Arthur Steven Daus in February 2009. Claimant also had surgery by Dr. David A. Ball on his right and left shoulders in October 2009 and January 2010, respectively.

At the request of claimant's attorney, Dr. Edward J. Prostic evaluated claimant on January 11, 2010. Dr. Prostic's report states:

> During the course of his employment for The Flesh Company, Michael E. Mullen sustained repetitious minor trauma to his neck and upper extremities. He has required anterior cervical discectomy and rotator cuff surgery to both shoulders. He is temporarily totally disabled from gainful employment by his left shoulder. He

---

[5] *Id.*, at 10.

[6] *Id.*, Resp. Ex. 1.

[7] *Id.*, Resp. Ex. 2.

[8] *Id.*

> needs additional physical therapy to both shoulders. No additional treatment is necessary for the cervical spine.[9]

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[10] A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."[11] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[12] The existence, nature and extent of the disability of an injured workman is a question of fact.[13] A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.[14] The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.[15]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[16] Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.[17]

Additionally, it is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or

---

[9] *Id.*, Cl. Ex. 1.

[10] K.S.A. 2008 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[11] K.S.A. 2008 Supp. 44-501(a).

[12] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[13] *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

[14] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[15] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[16] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[17] *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

intensifies the affliction.[18] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[19]

The ALJ found and concluded that claimant suffered an injury that arose out of and in the course of his employment with respondent. Based on the evidence compiled to date, the ALJ's Order is supported by the evidence and will be affirmed.

Both the respondent and claimant argue that Dr. Majzoub's opinions support their positions. At this juncture of the proceedings the scale tips in favor of the claimant. Dr. Majzoub opined that claimant's preexisting condition was aggravated. In one instance, he opined the preexisting condition was aggravated by the trauma resulting in the symptoms. In another instance, he opined that claimant's symptoms were an aggravation. As stated above, the test in Kansas is not whether the work duties caused the injury but, rather, whether the activity aggravated or accelerated the preexisting condition. Based on the evidence compiled to date, this Board Member concludes claimant sustained his burden of proof that his work-related injury aggravated his preexisting condition.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[20] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the preliminary hearing Order entered on January 27, 2010, is affirmed.

IT IS SO ORDERED.

---

[18] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[19] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

[20] K.S.A. 44-534a.

Dated this ____ day of April, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: Angela D. Trimble, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge